

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **MICAH EL A. HARRIS,**

Petitioner,

16 v.

17 **LARRY A. SMALL, Warden,**

18 Respondent.
19
20
21
22
23
24
25
26
27
28

08cv1229-WQH (LSP)

**NOTICE OF MOTION AND
MOTION TO DISMISS
PETITION FOR WRIT OF
HABEAS CORPUS**

Judge: Honorable Leo S. Papas

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 **MICAH EL A. HARRIS,**

Petitioner,

16 v.

17 **LARRY A. SMALL, Warden,**

Respondent.

08cv1229-WQH (LSP)

**NOTICE OF MOTION AND
MOTION TO DISMISS
PETITION FOR WRIT OF
HABEAS CORPUS**

Judge: Honorable Leo S. Papas

20 PLEASE TAKE NOTICE that Respondent, LARRY SMALL, Warden of Calipatria State
21 Prison in calipatria, California, hereby moves to dismiss the Petition for Writ of Habeas Corpus
22 under Rule 4 of the Rules Governing 28 U.S.C. section 2254 cases because Petitioner, MICHAEL
23 ANTHONY HARRIS, failed to file his petition within the statute of limitations period. See 28
24 U.S.C. § 2244 (d)(1).

25 ///

26 ///

27 ///

28 ///

1 This Motion is based on this Notice of Motion, the accompanying Memorandum of Points
2 and Authorities, and on the pleadings and state court records lodged with this Court.

3 Dated: September 4, 2008

4 Respectfully submitted,

5 EDMUND G. BROWN JR.
Attorney General of the State of California

6 DANE R. GILLETTE
Chief Assistant Attorney General

7 GARY W. SCHONS
Senior Assistant Attorney General

8 ANTHONY DASILVA
Deputy Attorney General

10 s/Andrew Mestman

11 ANDREW MESTMAN
12 Deputy Attorney General
13 Attorneys for Respondent

14 AM:adc

80278591.wpd

15 SD2008700658

CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Harris v. Small**
No.: **08cv1229-WQH (LSP)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2008, I served the following document **NOTICE OF MOTION AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: n/a

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

MICHAEL A. HARRIS
CDC# V-64465
CALIPATRIA STATE PRISON
P.O. BOX 5002
CALIPATRIA, CA 92233-5002
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2008, at San Diego, California.

A. Curiel

Declarant



Signature

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **MICHAEL A. HARRIS,**

Petitioner,

15 v.

16 **LARRY A. SMALL, Warden,**

17 Respondent.

08cv1229-WQH (LSP)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RESPONDENT'S MOTION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS**

Judge: Honorable Leo S. Papas

19
20
21
22
23
24
25
26
27
28

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **MICAHIEL A. HARRIS,**

15 Petitioner,

16 v.

17 **LARRY A. SMALL, Warden,**

18 Respondent.

08cv1229-WQH (LSP)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RESPONDENT'S MOTION TO
DISMISS PETITION FOR WRIT
OF HABEAS CORPUS**

Judge: Honorable Leo S. Papas

19
20 COMES NOW Respondent, Larry Small, Warden of Calipatria State Prison, through his
21 counsel, Edmund G. Brown Jr., Attorney General of the State of California and Andrew S. Mestman,
22 Deputy Attorney General, and respectfully submits the following Memorandum of Points and
23 Authorities in Support of his Motion to Dismiss pursuant to the Order of this Court filed on July 21,
24 2008.

25 **PROCEDURAL BACKGROUND**

26 A San Diego County Superior Court jury convicted Harris of nine counts of robbery
27 stemming from a smash-and-grab heist at a jewelry store. Harris was sentenced to prison for a term
28 of 48 years and eight months.

1 Harris appealed his conviction to the California Court of Appeal. (Lodgment 1.) In an
 2 unpublished opinion, the appellate court affirmed the convictions. (Lodgment 4.) Harris filed a
 3 petition for review in the California Supreme Court which was denied on June 14, 2006.
 4 (Lodgements 5, 6.) Harris did not petition for certiorari to the Supreme Court, and therefore his
 5 conviction became final for federal purposes ninety days later, on September 12, 2006. 28 U.S.C.
 6 § 2101(d); Rules of the Supreme Court of the United States, Rule 13.

7 On July 2, 2008, Harris filed his Petition for Writ of Habeas Corpus in the United States
 8 District Court for the Central District of California. On July 9, 2008, the Central District transferred
 9 the petition to this Court. On July 21, 2008, this Court ordered a response to the Petition.

10 **FACTUAL BACKGROUND**

11 The facts are irrelevant to the issues presented in this motion to dismiss. Accordingly,
 12 Respondent has omitted a statement of the factual background.

13 **ARGUMENT**

14 **I.**

15 **THE PETITION SHOULD BE DISMISSED WITH PREJUDICE** 16 **BECAUSE HARRIS FAILED TO FILE IT WITHIN THE STATUTE OF** **LIMITATIONS**

17 Respondent respectfully submits that this Court should dismiss the Petition, in that it is
 18 time-barred. Harris's state-court conviction became final for federal purposes in September 2006.
 19 Harris waited too long before filing his Petition in this Court. Because Harris should have known
 20 about his claims no later than the date of finality, he is not entitled to a later start of the limitations
 21 period or to equitable tolling. His Petition must be dismissed.

22 **A. Harris's State-Court Decision Became Final In September 2006**

23 28 U.S.C. § 2244(d) provides:

24 (1) A 1-year period of limitation shall apply to an application for a writ of
 habeas corpus by a person in custody pursuant to the judgment of a State court.

25 The limitation period shall run from the latest of -

26 (A) the date on which the judgment became final by the
 conclusion of direct review or the expiration of the time for seeking
 27 such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Harris's petition for review was denied by the California Supreme Court on June 14, 2006.

(Lodgment 6.) Because Harris did not petition for certiorari to the Supreme Court, his conviction became final for federal purposes ninety days later, on September 12, 2006. *See Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999).

Harris knew, or reasonably should have known, about the factual predicate of each of his claims, including any claim regarding ineffective assistance of counsel, no later than the date of finality, when he knew or should have known about all the issues raised and rejected in the appellate opinion. *See Hasan v. Galaza*, 254 F.3d 1150, 1154-55 n.3 (9th Cir. 2001) (noting that the standard for determining a claim's factual predicate is objective). He may not receive a later start to his limitations period under 28 U.S.C. § 2244(d)(1)(D). Absent either a delayed start to the limitations period under § 2244(d)(1) or statutory tolling under § 2244(d)(2), Harris had until September 12, 2007 to file his federal petition. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Harris did not sign the instant Petition until June 15, 2008, and so it is late.^{1/}

B. Harris Is Not Entitled To Statutory Tolling Under § 2244(d)(2)

Harris did not begin to seek any collateral relief, in state or federal court, until he filed the instant petition on July 2, 2008, Petition is untimely by nine months and should be dismissed with

1. Under the "mailbox rule," this Court may consider the date that Harris signed his habeas petitions as the date of filing because, presumably, that is the day that Harris handed it to prison authorities for mailing. *Houston v. Lack*, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988); *Huizar v. Carey*, 273 F. 3d 1220, 1222 (9th Cir. 2001).

1 prejudice. Harris is not entitled to any statutory tolling of the federal limitations period, under 28
 2 U.S.C. § 2244(d)(2), because the limitations period expired before he began to seek state-court relief.
 3 *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Green v. White*, 223 F. 3d 1001 (9th Cir. 2000).

4 **C. Harris Is Not Entitled To Any Equitable Tolling**

5 The Supreme Court has not ruled whether equitable tolling should apply to habeas corpus
 6 petitions. See *Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1085 (2007); *Pace v.*
 7 *DiGuglielmo*, 544 U.S. at 418 n.8. But under other Supreme Court precedent, it should not. See
 8 *Bowles v. Russell*, __U.S.__, 127 S. Ct. 2360, 2364-66, 168 L. Ed. 2d 96 (2007) (distinguishing
 9 statute-based time limits from rule-based time limits); *United States v. Beggerly*, 524 U.S. 38, 48,
 10 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (holding that equitable tolling was unavailable under the
 11 Quiet Title Act because it would be inconsistent with Congressional intent).

12 Even under extant circuit precedent, Harris has done nothing to carry his burden of
 13 establishing that he is entitled to equitable tolling. See *Smith v. Duncan*, 297 F.3d at 814; *Miranda*
 14 *v. Castro*, 292 F.3d 1063, 1065-66 (9th Cir. 2002). Harris bears the burden of establishing equitable
 15 tolling, and in order to do so he must demonstrate: (1) extraordinary circumstances beyond his
 16 control that (2) made it impossible to file a petition on time. *Id.* at 1066-67 (attorney miscalculation
 17 of AEDPA limitations period did not merit equitable tolling). Equitable tolling is "unavailable in
 18 most cases." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); see *Pace v. DiGuglielmo*, 544
 19 U.S. at 418 (requiring diligence).

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Harris does not make any argument regarding equitable tolling of the statute of limitations.
2 His Petition is late, and it must be dismissed with prejudice.

3 Dated: September 4, 2008

4 Respectfully submitted,
5 EDMUND G. BROWN JR.
Attorney General of the State of California
6 DANE R. GILLETTE
Chief Assistant Attorney General
7 GARY W. SCHONS
Senior Assistant Attorney General
8 ANTHONY DASILVA
Deputy Attorney General
9

10
11 s/Andrew Mestman
12 ANDREW MESTMAN
Deputy Attorney General
13 Attorneys for Respondent

14 AM:adc
80278595.wpd
15 SD2008700658
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Harris v. Small**
No.: **08cv1229-WQH (LSP)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2008, I served the following document **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: n/a

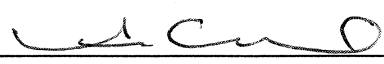
Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

MICHAEL A. HARRIS
CDC# V-64465
CALIPATRIA STATE PRISON
P.O. BOX 5002
CALIPATRIA, CA 92233-5002
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2008, at San Diego, California.

A. Curiel
Declarant


Signature

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **MICAH EL A. HARRIS,**

Petitioner,

15
16 v.

17 **LARRY A. SMALL, Warden,**

18 Respondent.
19
20
21
22
23
24
25
26
27
28

08cv1229-WQH (LSP)

NOTICE OF LODGMENT

Judge: Honorable Leo S. Papas

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 ANTHONY DASILVA
Deputy Attorney General
5 ANDREW MESTMAN, State Bar No. 203009
Deputy Attorney General
6 110 West A Street, Suite 1100
San Diego, CA 92101
7 P.O. Box 85266
San Diego, CA 92186-5266
8 Telephone: (619) 645-2458
Fax: (619) 645-2271
9 Email: Andrew.Mestman@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **MICHAEL A. HARRIS,**

Petitioner,

15
16 v.

17 **LARRY A. SMALL, Warden,**

18 Respondent.
19

08cv1229-WQH (LSP)

NOTICE OF LODGMENT

Judge: Honorable Leo S. Papas

20 Pursuant to the July 21, 2008, Order Requiring Answer To Petition For Writ of Habeas
21 Corpus (28 U.S.C. § 2254), Respondent hereby lodges the following records:

- 22 1. Reporter's Transcript for *People v. Michael Anthony Harris*, Superior Court Case
23 No. SCD182007 dated November 16, 18-19, 22, 2004, and January 10, 2005;
24 2. Clerk's Transcript for *People v. Michael Anthony Harris*, Superior Court Case
25 No. SCD182007;
26 3. Appellant's Opening Brief;
27 4. Respondent's Brief;
28 5. Appellant's Reply Brief;

6. Opinion, Court of Appeal, filed March 29, 2006;
7. Petition for Review, filed in the California Supreme Court; and
8. Order denying petition, California Supreme Court filed June 14, 2006.

Dated: September 4, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ANTHONY DASILVA
Deputy Attorney General

s/Andrew Mestman

ANDREW MESTMAN
Deputy Attorney General
Attorneys for Respondent

AM:adc

80278606.wpd

SD2008700658

CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Harris v. Small**
No.: **08cv1229-WQH (LSP)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2008, I served the following document **NOTICE OF LODGMENT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: n/a

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

MICHAEL A. HARRIS
CDC# V-64465
CALIPATRIA STATE PRISON
P.O. BOX 5002
CALIPATRIA, CA 92233-5002
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2008, at San Diego, California.

A. Curiel
Declarant


Signature